TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 473.

GAST REALTY & INVESTMENT COMPANY AND EMILY GAST, PLAINTIFFS IN ERROR,

vs.

SCHNEIDER GRANITE COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED APRIL 11, 1917.

(25,806)

(25,896)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 13, 1917.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Missouri, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Missouri before you, or some of you, being the highest Court of Law or Equity of the said State in which a decision could be had in the said suit at the October Term, 1916, of said Court between Schneider Granite Company, Plaintiff and Respondent, against Gast Realty & Investment Company and Emily Gast, Defendants and Appellants, being Cause No. 16439 in said Court, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Gast Realty & Investment Company, and Emily Gast, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the 10th day of March next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 8th day of February, in the year of our Lord one thousand nine hundred and Seventeen.

Issued at office in the City of Jefferson, with the seal of the District

Court of the United States for the Central Division of the Western Judicial District of Missouri, dated as aforesaid.

[Seal of the United States District Court, Central Division, Western District.]

JOHN B. WARNER,
Clerk of said District Court,
By H. C. GEISBERG, *Deputy.*

Allowed by—

W. W. GRAVES,
Chief Justice of the
Supreme Court of Missouri.

[Endorsed:] Filed Feb. 8, 1917. J. D. Allen, Clerk.

2 In the Supreme Court of Missouri.

STATE OF MISSOURI,
City of Jefferson, ss:

In obedience to the command of the foregoing writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said Supreme Court of Missouri, at office in the City of Jefferson, State of Missouri, this 22 day of February 1917.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN,
Clerk of the Supreme Court of Missouri.

3 In the Supreme Court of the State of Missouri. Court en Banc.

No. 16439.

SCHNEIDER GRANITE COMPANY, a Corporation, Plaintiff and Respondent,

vs.

GAST REALTY & INVESTMENT COMPANY, a Corporation, and EMILY GAST, Defendants and Appellants.

The above entitled cause coming on to be heard upon the petition of the appellants therein for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Missouri, and upon examination of said petition and the record in said matter,

and desiring to give the petitioners an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter:

It is ordered that a writ of error be, and is hereby allowed to this Court from the Supreme Court of the United States, and that the bond presented by said petitioners be and the same is hereby approved, and that said Writ of Error and Bond shall act as a supersedeas and stay execution.

W. W. GRAVES,
Chief Justice of the Supreme Court of the State of Missouri.

[Endorsed:] Filed February 8th, 1917. J. D. Allen, Clerk, by G. E. Silvers, D. C.

4 Which said Bond is in words & figures as follows, towit:

Know all men by these presents: That we, Gast Realty & Investment Company, a corporation, and Emily Gast, as principals, and Alex. Gast and Ferd. Gast, of St. Louis, Missouri, as sureties, are held and firmly bound unto the Schneider Granite Company, a corporation, in the full and just sum of Five Thousand Dollars ($5,000.00), to be paid to the said Schneider Granite Company, or its certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 20th day of February, in the year of our Lord one thousand nine hundred and seventeen.

Whereas, lately at the Supreme Court of Missouri in a suit pending in said Court, between Schneider Granite Company, a corporation, as Plaintiff and Respondent, against Gast Realty & Investment Company, a corporation, and Emily Gast, as Defendants and Appellants, being cause No. 16439 in said Supreme Court of Missouri, a final judgment was rendered against the said Gast Realty & Investment Company and Emily Gast, and the said Gast Realty & Investment Company and Emily Gast having obtained a writ of error and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Schneider Granite Company citing and admonishing it to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the said Gast Realty & Investment Company and Emily Gast shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

In Witness Whereof, the Gast Realty & Investment Company has caused these presents to be signed by its President and its seal to be affixed by its Secretary, and the other of the parties as principals and

sureties have hereunto set their hands and seals, the day and ye
above written.

[SEAL.] GAST REALTY & INVEST-
MENT CO.,
By ALEX. GAST, *President.*

Attest:

O. W. GAEBLER,
Acting Secretary.

EMILY GAST, [SEAL.]
By ALEX. GAST. [SEAL.]
ALEX. GAST. [SEAL.]
FERD. GAST. [SEAL.]

O. K.

HICKMAN P. RODGERS,
Atty. for Resp.

STATE OF MISSOURI,
City of St. Louis, ss:

On this 13th day of February, 1917, before me personally a
peared Alexander Gast, who first by me being duly sworn, depos
and says that he is the President of the Gast Realty & Investmer
Company, that the seal affixed to the foregoing instrument is th
corporate seal of said corporation and that said instrument was signe
and sealed on behalf of said corporation by authority of its Boar
of Directors, and the said Alexander Gast acknowledged said instr
ment to be the free act and deed of said corporation.

Before me also appeared Alexander Gast and Ferd Gast, known t
me to be the persons described in and who executed the foregoin
instrument and acknowledged that they executed the same as thei
free act and deed.

[SEAL.] FRED GABLE, JR.,
Notary Public.

My commission expires May 10th, 1918.

This Bond approved this 20th day of February, 1917.

W. W. GRAVES,
Chief Justice.

6 In the Supreme Court of the State of Missouri, Court en Banc.

No. 16439.

SCHNEIDER GRANITE COMPANY, a Corporation, Plaintiff and Respondent,

vs.

GAST REALTY & INVESTMENT COMPANY, a Corporation, and EMILY GAST, Defendants and Appellants.

To the Honorable W. W. Graves, Chief Justice of the Supreme Court of the State of Missouri:

Now come, the Gast Realty & Investment Company and Emily Gast, the defendants and appellants in the above entitled case, and allege that they are citizens of the United States of America; that the above entitled cause is a suit upon a special tax bill by the City of St. Louis to the plaintiff and respondent for the making and paving of a certain portion of Broadway in the City of St. Louis, upon which certain property of the defendants and appellants abuts.

That in the above entitled cause there was and is drawn in question the validity of certain statutes and ordinances of the City of St. Louis.

That in a writ of error to the Supreme Court of the United States, heretofore sued out in this cause on or about the 29th day of June, 1914, the judgment heretofore rendered herein was taken to the Supreme Court of the United States and was there by the opinion and mandate of the Supreme Court of the United States re-
7 versed and the mandate of that court was filed in this Court, directing such further proceedings in the case as might be consistent with said mandate and opinion. That motions for judgment filed by the parties hereto were transferred to the Court en Banc, and that upon a consideration of said motions for judgment, this Court filed an opinion on the 21st day of December, 1916, thereafter modified on the 17th day of January, 1917, by a supplemental opinion wherein this Court directed a judgment against the defendants for part of the tax bill sued on; that a motion for rehearing duly filed by defendants and appellants was duly overruled by this Court.

That the defendants and appellants claim and aver that the judgment and opinion of this Court fail to follow and comply with the orders and directions of the mandate of the Supreme Court of the United States in this case and that this Court erred in failing to comply with the said mandate and opinion of the Supreme Court of the United States and in failing to reverse said cause and direct judgment for the defendant, and erred in directing a judgment against the defendant for a part of the tax bill sued on, towit, the amount of the frontage tax, which is based upon, levied and supported by an Ordinance declared unconstitutional by the Supreme Court of the

United States in this case, and is in conflict with and repugnan
Section 1 of the Fourteenth Amendment to the Constitution of
United States.

Wherefore, your petitioners, the above mentioned defendants
appellants, pray that a writ of error may issue from the Supr
Court of the United States to the Supreme Court of the State of
souri, and the Judges thereof, to the end that the record in said ca
may be removed to the Supreme Court of the United Sta
8 and that your petitioners may be allowed to bring up for
view before the Supreme Court of the United States
judgment of the Supreme Court of Missouri; that citation be gran
and signed; that the bond herewith presented be approved and u
compliance with the terms of the Statute in such cases made
provided, said bond and writ of error may operate as a supersed
and your petitioners further pray that the errors complained of
your petitioners may be examined and said judgment of the
preme Court of the State of Missouri may be reversed; and that y
petitioners may have such other and further relief as in the prem
may be just and proper; and your petitioners will ever pray.

GAST REALTY & INVESTMENT CO
AND EMILY GAST,
Petitioner
By HOLLAND, RUTLEDGE & LASHLY
THOMAS L. RUTLEDGE &
DAVID GOLDSMITH,
Their Attorneys

The Writ of Error as prayed for in the above entitled caus
hereby allowed, this 8th day of February, 1917; the Writ of E
to operate as a supersedeas, and the bond for that purpose is fi
at the sum of $5,000.00.

Dated at Jefferson City, Missouri, this 8th day of February, 19

W. W. GRAVES,
Chief Justice of Supreme Court of State of Missour

Filed in my office this 8th day of February, 1917.

J. D. ALLEN,
Clerk of the Supreme Court of the State of Missour

[Endorsed:] No. 16439. In the Supreme Court of State of
souri. Schneider Granite Co., Plaintiff and Respondent, vs.
Realty & Investment Co. and Emily Gast, Defendants and Respo
ents. Petition for Writ of Error. Filed Feb. 8, 1917. J. D. Al
Clerk.

9 In the Supreme Court of State of Missouri, Court en Banc.

No. 16439.

SCHNEIDER GRANITE COMPANY, a Corporation, Plaintiff and Respondent,

vs.

GAST REALTY & INVESTMENT COMPANY, a Corporation, and EMILY GAST, Defendants and Appellants.

Assignment of Errors.

Now come the Gast Realty & Investment Company and Emily Gast, the above named defendants and appellants, and in connection with the petition for a writ of error herein, make the following assignment of errors, which they aver occurred in the judgment of the Supreme Court of the State of Missouri, which said judgment was rendered by the Supreme Court of Missouri and became final on January 17, 1917, and as and for said assignment of errors they respectfully aver and say:

The Supreme Court of the State of Missouri erred in not following and obeying the mandate of the Supreme Court of the United States in this cause, wherein the opinion and judgment of the Supreme Court of the United States was made and entered on the 31st day of January, 1916, and the motion for leave to file a petiton for rehearing was overruled on March 20th, 1916, wherein the mandate was dated the 1st day of April, 1916, and was filed in this Court on the 6th day of April, 1916.

10 The Supreme Court of the State of Missouri erred in failing to comply with the said mandate and opinion of the Supreme Court of the United States and in failing to reverse said cause and direct judgment for the defendant and erred in directing judgment against the defendant for a part of the tax bill sued on, towit, the amount of the frontage tax, which is based upon, levied and supported by an Ordinance declared unconstitutional by the Supreme Court of the United States in this case, and is in conflict with and repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Wherefore, said Gast Realty & Investment Company and said Emily Gast pray that said judgment of the Supreme Court of the State of Missouri may be reversed, annulled and altogether for naught held and that they may be restored to all things which they have lost by reason of said judgment of the Supreme Court of the State of Missouri.

GAST REALTY & INVESTMENT CO.
AND EMILY GAST,
By HOLLAND, RUTLEDGE & LASHLY,
THOMAS L. RUTLEDGE &
DAVID GOLDSMITH,
Attorneys for Defendants and Appellants.

[Endorsed:] No. 16439. In the Supreme Court of State of Missouri. Schneider Granite Co., Plaintiff and Respondent, vs. Gast Realty & Investment Co. and Emily Gast, Defendants and appellants. Assignment of Errors. Filed Feb. 8, 1917. J. D. Allen, Clerk.

11 UNITED STATES OF AMERICA, *ss.*:

To Schneider Granite Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of Missouri, in Cause No. 16439, pending in said Court, wherein Gast Realty & Investment Company and Emily Gast are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable W. W. Graves, Chief Justice of the Supreme Court of Missouri, this 8th day of February, in the year of our Lord, one thousand nine hundred and seventeen.

W. W. GRAVES,
Chief Justice of the
Supreme Court of Missouri.

Copy received this 20th day of February, 1917, and due service acknowledged for and on behalf of defendant in error, Schneider Granite Co.

HICKMAN P. RODGERS,
Attorney for Schneider Granite Co.

[Endorsed:] 16439. Filed Feb'y 22, 1917. J. D. Allen, Clerk. Per R. W. Morrow.

12 In the Supreme Court of Missouri.

And thereafter, towit on April 29th, 1916, the following further proceedings were had and entered of record in said cause:

"SCHNEIDER GRANITE CO., Resp.,

v.

GAST REALTY & INV. CO. et al., App.

Come now the said appellants, by attorney, and file their motion to enter judgment herein pursuant to the mandate of the Supreme Court of the United States, heretofore filed in this cause, and also file their suggestions in support of said motion."

Which said motion by appellants to enter judgment pursuant to the Supreme Court of the United States' mandate, is in words and figures as follows:

13 In the Supreme Court of Missouri, Division No. 2.

No. 16439.

SCHNEIDER GRANITE COMPANY, Respondent,

vs.

GAST REALTY AND INVESTMENT COMPANY and EMILY GAST, Appellants.

Appellants' Motion for Judgment and Suggestions in Support.

Motion for Judgment.

Come now the appellants and respectfully ask the Court to enter judgment pursuant to the opinion and mandate of the Supreme Court of the United States in this case, as follows, to-wit:

That the judgment of the Circuit Court herein be reversed and the cause remanded with directions to the Circuit Court to
13*a* enter judgment for the appellants and that judgment be entered for the appellants for their costs.

We prefer to have the judgment in this cause entered in the Circuit Court of the City of St. Louis, because the property to be affected is located in that city.

Suggestions in Support of Motion.

The Supreme Court of the United States reversed the judgment of this Court, and it follows that this Court must reverse the judgment of the Circuit Court and remand the case to have judgment entered for the appellants so as to clear the record of the lien of the tax bill.

13*b* The United States Supreme Court Held Unconstitutional the Ordinance upon Which the Tax Bill is Based.

At the outset, Mr. Justice Holmes said in the opinion:

"The only question here is whether the ordinance levying the tax under the charter of the city is consistent with the fourteenth amendment of the Constitution of the United States."

Later on in the opinion the Court said:

"If the law is of such a character that there is no reasonable presumption that substantial justice will be done, but the possibility is that the parties will be taxed disproportionately to each other and to the benefit conferred, the law cannot stand against the complaint of one so taxed in fact."

And again:

"It is enough to say that the ordinance following the order of the charter is bad upon its face." * * * "Judgment reversed."

Starting with the premise, that the only question involved in this case was the constitutionality of the ordinance levying this tax, and, after a discussion saying that "the law cannot stand" and "the ordinance following directions of the charter is bad upon its face," and ending with the words "judgment reversed," there would seem to be no room for doubt as to the meaning and intention of the Court to declare unconstitutional, and therefore wholly invalid, the particular ordinance before the Court in this case and the tax bills sued upon. Counsel for plaintiff say the opinion characterizes
13c the ordinance merely as bad and not as void. We confess that we cannot comprehend the distinction between a declaration that an ordinance is bad and one that the ordinance is invalid; and this is all the more so, when the ordinance is held to be "bad," because it is unconstitutional.

Principles Underlying the Decision of the Federal Supreme Court.

The theory underlying the decision of the Federal Supreme Court is that the manner, in which the taxing district must be laid out in cases of this character, is palpably arbitrary and a plain abuse of the taxing power, since it results in taxing the land in the district disproportionately and without regard to the benefits conferred. The following quotations from the opinion aptly summarize that theory:

"The differences were not based upon any consideration of the difference in benefits conferred, but were established mechanically in obedience to the criteria that the charter directed to be applied. * * * It is enough to say that the ordinance following the orders of the charter is bad upon its face as distributing a local tax in grossly unequal proportions, not because of special considerations applicable to the parcels taxed, but in blind obedience to a rule that requires the result."

Neither the propriety of the front-foot rule, nor of the area rule, as principles of taxation was involved; nor did the Supreme Court of the United States intend to question the right to resort in a proper manner to either of these two methods of taxation. The tax was invalidated because of the arbitrary manner in which the taxing district was laid out.

13d After the opinion of the Supreme Court of the United States was rendered, the City Counselor of the City of St. Louis, and attorneys representing the holders of other tax bills intervened as amici curiæ by motion, and represented that the opinion might be construed as invalidating not merely the ordinance in the case at bar, but also the charter provision under which that ordinance was passed, and consequently all street improvement tax bills issued under the charter. At the same time counsel for the plaintiff filed a motion for a rehearing. In reply to the latter motion we stated that it was not our purpose to reply to the motions of the amici curiæ, and added:

"Those motions involve a serious proposition which is not presented by the record in the case at bar."

Afterwards the motion for a rehearing was denied, or, literally speaking, not permitted to be filed, and a memorandum was filed by Mr. Justice Holmes, which states in substance, as we understand it, that the opinion of the Court was, of course, limited to ordinances like the one involved in the case, and to assessments in which the taxing area was laid out in the mode described in the opinion, and to complaints on the part of persons who consequently suffered from unequal taxation.

In short, the memorandum means that the Court intended by its opinion to go no further than to hold that the tax in the present case was invalid, and that the Court did not intend to pass upon other cases or to decide questions which were not involved. The
13*e* use of the words "of course" in the memorandum clearly indicates this. The use of that expression shows that the Court considered that its memorandum was addressed to what was obvious from the opinion itself. At all events, it would be unreasonable to say that the Court intended by its memorandum to limit the reasonable application of its opinion, or to withdraw anything which would naturally follow from what was contained in the opinion, or to qualify the opinion in any way; and that is all the more so, since the expression "of course" was used, and since the memorandum does not undertake in any way to discuss or consider any matter of dispute, or controversy, or of doubt, whatsoever.

Frontage Tax.

Notwithstanding the parts of the opinion of the Supreme Court of the United States, to which we have directed attention, counsel for the plaintiff claim, and almost undertake to assume, that the part of the tax bill in suit, which represents the frontage tax, has been sustained by the Supreme Court of the United States. This contention, or, as we have said, assumption, is wholly without foundation.

The opinion of the Supreme Court declares that the ordinance underlying the tax bill is bad. The opinion of the Supreme Court does not contain a single word sustaining the part of the tax bill, which is based on frontage. It is not conceivable that the Supreme Court would have done this, if it had the slightest doubt as to the invalidity of that part of the tax. When the Court declared the ordinance bad as a taking of property without due process of law, it must have known that the natural conclusion would be that the tax
13*f* based upon that ordinance was void. Had the Court had any thought of limiting that effect of its ruling, it would have said so in clear terms.

A sound and valid ordinance was essential to the validity of the special tax bill sued upon. That has been so often declared by this Court that it is unnecessary to cite authorities in support of it.

And the Federal Supreme Court recognized this; for, when it said at the outset of its opinion that "the only question here is whether the ordinance levying the tax under the charter of the city is con-

sistent with the Fourteenth Amendment to the Constitution of the United States", it recognized that the whole tax was necessarily invalid if the ordinance was at variance with the constitutional provision. This declaration would have been incorrect if, besides the question as to the validity of the ordinance, there was a further question as to the validity of a part of the tax sought to be enforced herein.

In this connection we may refer to the following remarks of the United States Circuit Court of Appeals for the Eighth Circuit in Guarantee Co., Etc., v. Ins. Co., 124 Fed. Rep., l. c. 171, on the effect of rulings of an appellate court:

"This condition of the record suggests the query whether the questions raised by the record of the court during the trial were not rendered res judicata by the former judgment of this court upon the writ of error set out by the plaintiff. That judgment, like the final decision of every court which has jurisdiction of the matters and parties it judges, rendered every question which was litigated and every question which might have been raised and determined
13*g* in this court at the time of the hearing of a former writ of error res judicata between the parties to it."

Aside from the fact that the decision of the Supreme Court of the United States, which must now be followed by this court, disposes of the question, we might say that the portion of the tax levied according to frontage is invalid, because the provision for it is an inseparable part of the ordinance, as well as because there must be a sound underlying law to warrant any special tax. Both of these propositions are sustained by the case of Bennett v. City of Emmettsburg, 138 Iowa 67, l. c. 81.

In that case the statute provided for the assessment of a sewer tax only upon adjacent or abutting property. Notwithstanding this, a municipality undertook to levy a sewer tax upon both adjacent and non-adjacent property. This situation led to the following remarks by the Court:

"Authority to levy special assessments must be found in the statute and no provision on the subject can be found which goes farther than to authorize a levy upon abutting or adjacent property. * * * There was then no authority for an assessment upon non-adjacent property. And we think there are no grounds on which to justify an assessment on the property within the zone of adjacency. Even if the assessment were divisible—a subject of much doubt—it still remains to be said that there is a failure of compliance with the code."

Paraphrasing the last sentence, we might remark that even
13*h* if the frontage tax were separable, it still remains to be said that there was a failure of compliance with the Constitution.

Similarly it is remarked in the excellent work of Page and Jones on "Taxation by Assessment", Sec. 81, page 135:

"If, on the other hand, the unconstitutional provision is so closely connected in effect and meaning with the remainder of the statute that it cannot be presumed that the Legislature would have passed the valid part of the statute without the invalid provision, the in-

alidity of such integral part of the statute invalidates the entire tatute. This is especially true where the only authority for doing he work for which the assessment is to be levied is found in that part f the statute which is unconstitutional."

Finally, it may be remarked that the part of the tax sued upon, hich was levied according to frontage, is subject to the same ground f objection as the area tax. The frontage tax was levied upon the ery same property as the area tax; and if the area tax was invalid ecause it was levied upon property which was not taxable, surely he frontage tax, levied to the same extent, would be invalid for the ame reason. For the basis of the decision was the mechanical, arbirary and unfair boundaries of the taxing district. The principles f taxation involved in the frontage tax was not involved, as the pinion itself clearly states.

In Construction Co. v. Hauessler, 201 Mo. 400, l. c. 411, this ourt held that the expression "calculating a depth to such property of 150 feet" was intended not only to limit the amount of the
3i assessment to a fixed percentage of the assessed value of the property, but also the depth to which the property could be ssessed; and the Court thus clearly recognized that an assessment of roperty to a depth greater than was warranted invalidates the tax ust as much as an assessment of the property for a greater amount han is warranted.

Under these circumstances we do not deem it necessary to enter nto any discussion of the further contention or assumption of the laintiff that it is entitled to judgment not only for the part of the ax which was levied for frontage, but also to the interest thereon.

The Attempt to Establish a New Area Tax.

The suggestions filed by the plaintiff contain the fantastic notion hat this Court can convert itself into an assessment board, or, what s the same thing, direct the trial court to convert itself into such board, and that the Court can then in effect make a new assessment olding other property than that now assessed, and making the ssessment for a different amount and upon a different principle, and hat the Court, after having done this, and thus substituted a new tax or one which was invalid, can enforce the new tax in a suit brought o enforce the invalid tax; and that, too, without reference to the fact hat the right to amend the tax bill sued upon, even by those who ad authority to amend it, is now barred by the statute of limitaons. This suggestion is all the more strange because this Court has held that tax bills can be amended only by the officers by
3j whom they were originally issued, even though such officers be out of office at the time of amendment.

We do not feel called upon to enter into a discussion of this very ovel contention, though we may remark in passing that the case of eil v. Ridge, 220 Mo. 233, upon which the plaintiff relies, arose nder the Charter of Kansas City, and merely upholds the right of a ourt to change the amount of the tax bill (not the right to change he property taxed) because the Kansas City charter providing for

the tax bill expressly directs that such an amendment in the amount may be made, a provision and condition which does not exist with reference to the Charter of the City of St. Louis. It suffices to say that this contention is an effort to induce this Court to disobey the mandate of the Supreme Court of the United States by rendering a judgment which would unquestionably be in conflict with the opinion of that court.

13*k* We suggest that we are entitled to an immediate compliance with the mandate of the Supreme Court of the United States, and that any hearing upon the matter should therefore be had at the present term of this court.

Respectfully submitted,

HOLLAND, RUTLEDGE & LASHLY AND
DAVID GOLDSMITH,
Attorneys for Appellants.

14 UNITED STATES OF AMERICA, *ss:*

[SEAL.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Missouri, Greeting:

Whereas, lately in the Supreme Court of the State of Missouri, before you, or some of you, in a cause between Gast Realty & Investment Company and Emily Gast, appellants, and Schneider Granite Company, respondent, wherein the judgment of the said Supreme Court, entered in said cause, is in the following words, viz:

"Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of the City of St. Louis rendered, be in all things affirmed and stand in full force and effect, and that the said respondent recover against the said appellants its costs and charges herein expended, and have therefor execution,"

as by the inspection of the transcript of the record of the said Supreme Court which was brought into the Supreme Court of the United States by virtue of a writ of error agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and fifteen, the said cause came on to be heard before the Supreme Court of the United States on the said transcript of record, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be, and the same is hereby, reversed with costs; and that the said appellants, Gast Realty & Investment Company and Emily Gast, recover against the said respondent Five hundred and forty-nine dol-

ars and ten cents for their costs herein expended and have execu-ion therefor.

And it is further ordered that this cause be, and the same is hereby, emanded to the said Supreme Court for further proceedings not nconsistent with the opinion of this Court.

January 31, 1916.

15 And the same is hereby remanded to you, the said Judges of the said Supreme Court of the State of Missouri, in order hat such execution and further proceedings may be had in the said ause, in conformity with the judgment and decree of this Court above stated, as, according to right and justice, and the Constitution and laws of the United States, ought to be had therein, the said writ of error notwithstanding.

Witness the Honorable Edward D. White, Chief Justice of the United States, the first day of April, in the year of our Lord one thousand nine hundred and sixteen.

Costs of Appellants.

Clerk	$104.60
Printing record	$424.50
Attorney	$20.00
	$549.10

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

16 And thereafter, to-wit, on December 21st, 1916, the following further proceedings were had and entered of record in said cause:

In the Supreme Court of Missouri.

"SCHNEIDER GRANITE COMPANY, Respondent,

vs.

GAST REALTY & INVESTMENT COMPANY and EMILY GAST, Appellants.

Appeal from the Circuit Court, City of St. Louis.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of the City of St. Louis rendered, be reversed, annulled and for naught held and esteemed, and that the said appellants be restored to all things which they have lost by reason of the said judgment. It is further considered and adjudged by the Court that the said cause be remanded to the said Circuit Court of the City of St. Louis for fur-

ther proceedings to be had therein in conformity with the opinion of this Court herein delivered, and that the said appellants recover against the said respondent their costs and charges herein expended, and have execution therefor." (Opinion filed.)

Which said opinion is in words and figures as follows:

17 Which said opinion rendered December 21st, 1916, is in words and figures as follows:

In the Supreme Court of Missouri, en Banc, October Term, 1916.

No. 19464.

SCHNEIDER GRANITE COMPANY, Respondent,

vs.

INDEPENDENT BREWERIES COMPANY, Appellant.

No. 19465, No. 19439, No. 19414.

SCHNEIDER GRANITE COMPANY, Respondent,

vs.

GAST REALTY & INVESTMENT CO., Appellant.

These cases have heretofore been heard and determined in Division No. 2 and the judgments of the trial court affirmed. (259 Mo. 153.) On error to the Supreme Court of the United States there was a reversal of the judgments rendered in our former hearings on the ground that the ordinance of the City of St. Louis there involved was invalid in providing for special assessments for street improvements based on the area of the property assessed without requiring an equal depth of the assessment district, thereby subjecting lot owners having a greater depth of property than those adjoining them, to unequal taxation.

Upon the coming down of the mandate of the United States Supreme Court the cases were transferred to the court en banc, where they have been argued and submitted. A reasonable construction, of the ruling of the Supreme Court of the United States is that it is limited to a holding of the invalidity of the ordinance in
18 question only so far as the latter concerns an assessment of property for street improvement based on the area rule. In discussing the Supreme Court's opinion in Ruecking Con. Co. v. Withnell (not yet reported) we reached a like conclusion.

The tax bills in the cases under review clearly define the amounts due under the front foot rule as well as the area rule and state the respective amounts due under each. Since we have passed upon all of the assignments of error made by the defendant in our former review of these cases and our conclusions in regard thereto, except as stated, have not been questioned by the United States Supreme

Court, there exists no reason or necessity for another hearing below of the matters at issue. That the tax for street improvements under the charter of the City of St. Louis is severable there can be no question (Collier Estate v. West Pav. Co., 180 Mo. l. c. 375), and as the amounts due under each of the methods of taxation are separately stated in the tax bills, no difficulty can be encountered in determining the amounts due in each upon the frontage basis.

We therefore reverse and remand these cases with directions to the trial court to enter up judgments in each in the amounts heretofore found to be due based on the assessments under the front foot rule, with interest thereon as authorized by Sec. 25 of Art. 6 of the charter of the City of St. Louis. And it is so ordered. All concur except Bond & Faris, JJ. not sitting.

R. F. WALKER, *J.*

19 And afterwards, to-wit, on the 30th day of December, 1916, the following further proceedings were had and entered of record in said cause:

In the Supreme Court of Missouri, en Banc.

"SCHNEIDER GRANITE COMPANY, Resp.,

v.

GAST REALTY & INV. CO. et al., App's.

Comes now the said respondent, by attorney, and files its motion for a rehearing herein, and therewith files its memorandum in support of said motion. Come also the said appellants, by attorney, and file motion for a rehearing herein."

And thereafter, to wit, on the 17th day of January, 1917, the following further proceedings were had and entered of record in said cause:

"SCHNEIDER GRANITE CO., Resp.,

v.

GAST R. & I. CO. et al., App's.

Now at this day the Court having fully considered and understood the motion of the said respondent, as also the motion of the said appellants, for a rehearing herein, doth order that said motions, and each of them be, and the same are hereby overruled."

Which said motion of appellants for a rehearing herein is in words and figures as follows, to wit:

20 In the Supreme Court of Missouri, en Banc.

No. 19464.

SCHNEIDER GRANITE COMPANY (a Corporation), Respondent,

vs.

INDEPENDENT BREWERIES COMPANY (a Corporation), Appellant.

Appellant's Motion for Rehearing.

Now comes the Independent Breweries Company, the defendant and appellant in the above-entitled cause, and moves the Court to grant it a rehearing herein. And for ground of this motion this defendant respectfully shows and says:

That the facts in this cause are substantially the same as the facts in cause No. 19465, and that this defendant, therefore, as a matter of convenience, and to save the time of this Court, does not set forth those facts in full, but merely refers to the statement of them in the motion for rehearing in said cause No. 19465.

And this defendant further respectfully shows and says that, as shown by said motion for a rehearing, this Court has misconceived the facts involved in said cause No. 19465 and in this cause.

And this defendant further respectfully shows that the facts of this cause were duly submitted by its counsel to this Court, though not with all the details set forth in said motion for a rehearing in said cause No. 19465.

And for further ground for a rehearing this defendant respectfully shows that the following questions decisive of the case, and duly submitted by counsel, have been overlooked by this Court, namely:

(1) That the action of the trial court on the retrial of this cause amounted to an oral re-assessment of the tax by the trial court, and was in excess of its jurisdiction.

(2) That the judgment of the trial court was erroneous in that the property charged thereby was not the same as that charged in the special tax bill in suit.

(3) That at the time of the retrial the special tax bill in suit was not amenable by any one, since no amendment may be made after the statute of limitations has intervened.

And the defendant now, in connection with the questions thus submitted, respectfully shows that, through inadvertence of its counsel, the provision of Section 10, of Article XXIII of the present Charter of the City of St. Louis, which said section is fully set forth in said motion for a hearing in said cause No. 19465, has not been called to the attention of this Court.

20a And the defendant now, in connection with the questions thus submitted, also respectfully shows that its counsel, through inadvertance, have failed to call the attention of

this Court to the decision of this Court in City of St. Louis to Use of Deppelheuer v. Newman, 45 Mo. 138.

And for further ground for rehearing, this defendant respectfully shows that, as fully set forth in said motion for a rehearing in said cause No. 19465, the direction of this Court to the trial court in this cause is incapable of performance, because the assessment for frontage according to the special tax bill in suit in this cause has been vacated and superseded, and because no assessment for frontage has been made in the present judgment of the trial court.

And for further ground for a rehearing this defendant respectfully shows that, as fully set forth in said motion for a rehearing in said cause No. 19465, even if the trial court had jurisdiction to determine and adjudge in this action the correct amount for the assessment of frontage, nevertheless that determination could not reasonably or legally take effect in any respect, or bear interest, from a time anterior to the making thereof; and, furthermore, that the Charter of the City of St. Louis, by its provisions, clearly intends that no charge for interest should be made until the party assessed has had thirty days' notice of the issue of a valid tax bill, and the direction of this Court for the charge of interest does not conform to the purpose of those provisions.

And this defendant further respectfully shows that the direction of this Court for the charge of interest is repugnant to the prior ruling of this Court in Barber Asphalt Paving Company v. Peck, 186 Mo., l. c. 520, and to the entire current of authority elsewhere, in so far as counsel for defendant have been able to ascertain the same, as is more fully shown in said motion for a rehearing in said cause No. 19465.

And this defendant further shows that the charge of interest directed by the opinion of this Court is, under the facts of this case, repugnant to the Fourteenth Amendment of the Constitution of the United States, in that the property of this defendant is taken thereby without due process of law.

HOLLAND, RUTLEDGE &
LASHLY AND
DAVID GOLDSMITH,
Attorneys for Said Defendant and Appellant.

21 In the Supreme Court of Missouri.

And thereafter, to-wit, on the 17th day of January, 1917, the following further proceedings were had and entered of record in said cause:

SCHNEIDER GRANITE COMPANY, Respondent,

vs.

GAST REALTY & INVESTMENT COMPANY and EMILY GAST, Appellants.

Appeal from the Circuit Court, City of St. Louis.

Now at this day, come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of the City of St. Louis rendered, be reversed, annulled and for naught held and esteemed, and that the said appellants be restored to all things which they have lost by reason of the said judgment. It is further considered and adjudged by the court that the said cause be remanded to the said Circuit Court of the City of St. Louis for further proceedings to be had therein, in conformity with the opinion of this Court herein delivered, and that the said appellants recover against the said respondent their costs and charges herein expended, and have execution therefor. (Modified opinion filed.)

22 Which said modified opinion is as follows:

In the Supreme Court of Missouri.

En Banc.

October Term, 1916—January Call, 1917.

No. 16439.
No. 16414.
No. 19464.
No. 19465.

SCHNEIDER GRANITE COMPANY, Respondent,

vs.

GAST REALTY AND INVESTMENT COMPANY, Appellant.

SCHNEIDER GRANITE COMPANY, Respondent,

vs.

INDEPENDENT BREWERIES COMPANY, Appellant.

Modified Opinion.

Cases numbered 16439 and 16414 have heretofore been heard and determined in Division No. 2 and the judgments of the trial court

rendered therein were affirmed. On error to the Supreme Court of the United States there was a reversal of the judgment rendered on former hearings on the ground that the ordinance of the City of St. Louis there involved was invalid in providing for special assessments for street improvements based on the area of the property assessed without requiring an equal depth of the assessment district, thereby subjecting lot owners having a greater depth of property than those adjoining them to unequal taxation. Upon the coming down of the mandate of the Supreme Court of the United States the cases above numbered were transferred to the court en banc as well as cases numbered 19464 and 19465, in which the underlying ordinance and the taxing district were the same as in cases numbered 16439 and 16414. It is conceded by counsel for appellant that the ruling of the Supreme Court of the United States is determinative of cases 19464 and 19465 as well as cases 16439 and 16414, and that "the facts in all of the cases are the same, the depth of defendant's
23 property the same and the alleged disproportionate taxation the same." Under these circumstances it follows that a like ruling is applicable here in all of these cases.

A reasonable construction of the ruling of the Supreme Court of the United States is that it is limited to a holding of the invalidity of the ordinance in question only so far as the latter concerns an assessment of property for street improvement based on the area rule. In discussing the United States Supreme Court's opinion in Ruecking Con. Co. vs. Withnell (not yet reported), we reached a like conclusion.

The tax bills in the cases under review clearly define the amounts due under the front foot rule as well as the area rule and state the respective amounts due under each.

Our conclusions reached in cases numbered 16439 and 16414 have not, except as stated, been questioned by the Supreme Court of the United States. Holding as we do that our rulings are applicable alike to all of these cases, there exists no reason or necessity for another hearing below of the matters at issue. That the tax for street improvement under the character of the City of St. Louis is severable there can be no question (Collier Est. v. West Pav. Co., 180 Mo. 1 c., 375) and as the amounts due under each of the methods of taxation are separately stated in the tax bills, no difficulty can be encountered in determining the taxes due in each upon the frontage basis.

We therefore reverse and remand these cases with directions to the trial court to enter up judgment in each in the amounts heretofore found to be due based on the assessment under the front foot rule, with interest thereon as authorized by Sec. 25 of Art. 6 of the charter of the City of St. Louis, and it is so ordered. The original opinion rendered herein is modified only to distinguish the facts in regard to the status after the appeals to this court of the cases here
24 determined and the motion for rehearing filed therein is overruled.

All concur except Bond, Williams and Faris, *JJ.*, not sitting.

R. F. WALKER, *J.*

25 In the Supreme Court of the State of Missouri.

No. 16439.

SCHNEIDER GRANITE COMPANY, a Corporation, Plaintiff and Respondent,

vs.

GAST REALTY & INVESTMENT COMPANY, a Corporation, and EMIL GAST, Defendants and Appellants.

Præcipe of Plaintiffs in Error, Appellants.

To the Clerk of the Supreme Court of Missouri:

You are hereby requested and directed to make a transcript o record to be filed in the Supreme Court of the United States, pu suant to a Writ of Error allowed plaintiffs in error (defendants) i the above entitled cause, being Cause No. 16439 in the Supreme Cou of the State of Missouri, and to incorporate (by originals or b copies, as may be proper) into the transcript of record, the followin papers and exhibits:

1. The Writ of Error of appellants with petition therefor and th order of Honorable W. W. Graves, Chief Justice of the Suprem Court of the State of Missouri, allowing said writ of error, supers deas, bond and assignment of errors appertaining thereto and cit tion.

2. Mandate of the Supreme Court of the United States.

3. Motion filed by appellants in the Supreme Court of Missouri t enter judgment pursuant to the opinion and mandate of the Suprem Court of the United States in this case.

26 4. Opinion of the Supreme Court of the State of Missou in said cause, rendered on December 21, 1916.

5. Judgment of the Supreme Court of the State of Missouri i said cause.

6. Motion filed by appellants on the above entitled cause for r hearing of said cause.

7. Modification of said opinion rendered January 17, 1917, an judgment.

8. Order of the Supreme Court of the State of Missouri ove ruling said motion for rehearing.

9. Præcipe for transcript.

10. Certificate.

and file said transcript with the Clerk of the Supreme Court of th United States.

HOLLAND, RUTLEDGE & LASHLY,
THOMAS S. RUTLEDGE, AND
DAVID GOLDSMITH,
Attorneys for Plaintiffs in Error, Appellants.

Copy received this 20th day of February, 1917.

HICKMAN P. RODGERS,
Attorney for Respondent.

[Endorsed:] No. 16,439. In the Supreme Court of the State of Missouri. Schneider Granite Company, a Corporation, Plaintiff, vs. Gast Realty & Investment Company, a Corporation, and Emily Gast, Defendants. Præcipe of Plaintiff in Error, Appellants. Filed Feb. 22, 1917. J. D. Allen, Clerk.

27 In the Supreme Court of Missouri.

No. 19439.

SCHNEIDER GRANITE CO., Resp. (D. E.).
vs.
GAST REALTY & INV. CO., and EMILY GAST, App's (P. E.).

STATE OF MISSOURI, *sct.*:

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and correct transcript of the record and proceedings in the above-entitled cause as called for in the præcipe for transcript filed by plaintiffs in error herein, as fully as the same appear of record or on file in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Supreme Court of Missouri at my office in the City of Jefferson, State aforesaid, this 22 day of February, 1917.

[SEAL.] J. D. ALLEN,
Clerk of the Supreme Court of Missouri.

Endorsed on cover: File No. 25,896. Missouri Supreme Court, Term No. 1066. Gast Realty & Investment Company and Emily Gast, Plaintiffs in Error, vs. Schneider Granite Company. Filed April 11th, 1917. File No. 25,896.

3

FILED
SEP 8 1917
JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

SCHNEIDER GRANITE COMPANY,
Plaintiff in Error

vs.

GAST REALTY & INVESTMENT COMPANY and EMILY GAST,
Defendants in Error

No. [redacted]461
October Term, 1916.

GAST REALTY & INVESTMENT COMPANY and EMILY GAST,
Plaintiffs in Error.

vs.

SCHNEIDER GRANITE COMPANY,
Defendant in Error.

No. 473.
October Term, 1917.

Brief and Argument of Schneider Granite Company on Its Writ of Error; and Memorandum on Writ of Error of Gast Realty & Investment Company and Emily Gast.

HICKMAN P. RODGERS,
WILLIAM K. KOERNER,
Attorneys for Schneider Granite Company.

Wilson Printing Co., Brief and Transcript

IN THE

SUPREME COURT OF THE UNITED STATES

SCHNEIDER GRANITE COMPANY, *Plaintiff in Error* vs. **GAST REALTY & INVESTMENT COMPANY and EMILY GAST,** *Defendants in Error*	**No. 1046. October Term, 1916.**
GAST REALTY & INVESTMENT COMPANY and EMILY GAST, *Plaintiffs in Error.* vs. **SCHNEIDER GRANITE COMPANY,** *Defendant in Error.*	**No. 473. October Term, 1917.**

Brief and Argument of Schneider Granite Company on Its Writ of Error; and Memorandum on Writ of Error of Gast Realty & Investment Company and Emily Gast.

STATEMENT

This is an action upon a special tax bill issued by the City of St. Louis, and comes before this Court for the second time. The opinion delivered by this Court upon the first hearing, reported in 240 U. S., at page 55, and

set forth in full on pages 5, 6 and 7 of the Transcript of Record, case No. 1046, states the facts. Pursuant to this opinion the cause was remanded to the Supreme Court of the State of Missouri for further proceedings, and in that court both plaintiff and defendants then filed motions for judgment; the motion of plaintiff (respondent in Missouri Supreme Court) asking that the cause be remanded to the Circuit Court of the City of St. Louis with instructions to render judgment in favor of plaintiff for the amount assessed against defendants' property according to its frontage and for such part of the amount assessed against it according to its area as might be chargeable against it conformably to such mode of ascertainment as the Court in its mandate might prescribe (Transcript of Record, case No. 1046, page 12). The motion of defendants (appellants in said Missouri Supreme Court) asked that the cause be remanded to the St. Louis Circuit Court with instructions to enter judgment in ~~its~~ favor (Transcript of Record, case No. 1046, page 13). A hearing was had upon these motions and the Missouri Supreme Court, in an opinion, reported in 191 S. W., page 689, and set forth verbatim, on pages 14 and 15, and, as modified, on pages 17 and 18 of the Transcript of the Record, case No. 1046, held that under the ruling of this court so much of the assessment as is charged against defendants' property according to the area rule is wholly bad. The cause was accordingly remanded to the Circuit Court with instructions to enter judgment for plaintiff for the amount of the assessment levied according to frontage only.

Plaintiff contends that it is entitled to judgment against defendants' property, not only for said frontage tax, but also for so much of the area tax as is

proportionate to the benefits derived by said property from the improvement in question. This right is claimed under the judgment of this Court and is denied by the judgment of the Supreme Court of Missouri. Hence, a federal question is presented. This question is raised by the respective motions for judgment filed in the Missouri Supreme Court.

Specification of Error Relied On.

The Supreme Court of Missouri erred in construing the opinion of this court to hold that the assessment by area against defendants' property is wholly bad and in rendering judgment in accordance with such construction, denying plaintiff the right to judgment for any part of such area assessment.

ARGUMENT

The question presented is whether under a true interpretation of this court's opinion the assessment charged against defendants' property according to area is condemned in its entirety, or only so much thereof as is unjust. Analysis of the opinion leads us to adopt the latter view. In the last sentence of the second paragraph of the opinion, Mr. Justice Holmes says that when "the probability is that the parties will be taxed disproportionately to each other and to the benefits conferred, the law cannot stand **against the complaint of one so taxed in fact.**" (The bold face type is ours.) Again, in the memorandum on the petition for rehearing, the learned Justice says:

> "Our decision is limited, **of course**, to the particular ordinance before the court; to the assessment of three-quarters determined in the mode described, and **to those who, like the plaintiff in error, have suffered from the inequalities that have no justification in law.**" (The bold face type is ours.)

The plain meaning of the above quoted extracts is that only those property owners who have suffered from the disproportionate assessment can be relieved from its burdens. Those against whom the assessment was not excessive in view of the benefits received, must pay their tax. Not having "suffered from the inequalities that have no justification in law" they have no just complaint. If, then, those who have not been excessively taxed must pay their tax, can it be that those who have been excessively taxed need pay noth-

ing at all? Must those who have been fairly or too little taxed pay their tax in full while those who have been taxed too much go wholly free?

Such a rule would work more inequality than does the charter rule. Why should property that has been benefited to a depth of, say for example, 100 feet, be entirely relieved from assessment because assessed to a depth of more than 100 feet? Assume a case where A and B are adjoining landowners, and, under the charter, A's property is assessed to a depth of 100 feet and B's to a depth of 1000 feet. Assume, further, that the assessment against A's property is well within the benefits conferred. Must B pay nothing, while A pays the whole of his tax?

Expressions in the opinion of this Court to the effect that certain lots were assessed by the area "much farther than the distance within which paving could be supposed to be a benefit," and "the differences were not based upon any consideration or difference of benefits conferred," make it apparent that this Court was intent upon relief from discrimination. It surely did not mean that the man with the shallow lot would be required to pay the tax against his lot because it was just, and that the man with the deep lot would not be required to pay any part of it because of discrimination against him in favor of the owner of the shallow lot. To thus interpret the opinion would but reverse the discrimination.

In the case at bar defendants' property undoubtedly derived great benefit from the improvement in question. If it were assessed by area to what might be considered a reasonable depth there would be no reason for relieving it from assessment. Shall it entirely escape and receive its benefit as a gratuity at the un-

fortunate contractor's expense merely because assessed to a greater depth than may be considered fair?

We take the position that it was not the purpose of this Court to announce a rule so productive of inequality and injustice; that, rightly construed, this Court's opinion does not condemn the area assessment against defendants' property in its entirety, but only so much thereof as is disproportionate to the benefits which said property has received from the improvement in question. In his dissenting opinion in the case of French vs. Barber Asphalt Paving Co., 181 U. S. 324, Mr. Chief Justice White expresses what is, we believe, the true rule of decision in the present case. At page 378 the Chief Justice says:

> "In our judgment the exaction from the owner of private property of the cost of public improvement in substantial excess of the special benefits accruing to him is, **to the extent of such excess,** a taking under the guise of taxation of private property for public use without compensation." (The bold face type is ours.)

This is plainly the just and logical rule. It is just that the property owner be relieved from the payment of a burden for which he receives no corresponding benefit; but there is no reason why he should escape payment of his fair share for benefits actually conferred. It is the excess of burden over benefits, and only such excess, that is an unjust exaction. So far as the benefits go—so far the tax should be good—all that is good should be collectable by the contractor whose work and material have gone into the making of the improvement.

If we are right in our above interpretation of this Court's opinion, then plaintiff is entitled to have the

good part of this area assessment separated from the bad and to have judgment for so much as is good. It was, therefore, the duty of the Supreme Court of Missouri to remand the case to the Circuit Court with directions to ascertain, in such way as said Supreme Court may prescribe, the just portion of this area assessment chargeable against defendants' property, and to enter judgment for plaintiff for the amount thereof plus the amount of the frontage assessment.

Of course, if, in the opinion of the Supreme Court of Missouri, no procedure or legal method exists for the making of this separation, then it is that Court's privilege to hold that, although under this Court's ruling so much of the area assessment as is in accord with benefits is good, yet it cannot be separated from the bad and plaintiff's right thereto must fail for lack of remedy. Such is not, however, the decision of that Court up to the present time. Its present ruling is based entirely upon the assumption that this Court has held the area assessment against defendants to be bad in its entirety. If this assumption is erroneous, then this cause should be remanded to that court with directions to render judgment in accordance with a right construction of this Court's opinion.

Memorandum on Writ of Error of Defendants Gast Realty and Investment Company and Emily Gast.

Not content with being relieved by the judgment of the Missouri Supreme Court from the payment of any part of the area tax, defendants Gast Realty and Investment Company and Emily Gast have sued out a writ of error from this Court asking that said judgment be reviewed and the small frontage tax (amounting to much less than one-fourth of the whole tax bill) be

condemned. No theory upon which this relief should be awarded is apparent to us. The judgment of this Court on the former hearing is expressly limited in its application to the area assessment. (See memorandum of Court on petition for a rehearing. Transcript in case No. 1046, page 7.) And the front foot rule of assessment for street improvements is expressly sanctioned in the opinion of this Court in this case. The Supreme Court of Missouri holds that this frontage assessment is separable, and its ruling on this point does not present a federal question. Having been held constitutional by this Court, and separable by the state Court, no reason is perceived why defendants should be exempted from its payment.

Respectfully submitted,

HICKMAN P. RODGERS,
WILLIAM K. KOERNER,

Attorneys for Schneider Granite Company.

4

Supreme Court, U. S.
FILED
OCT 4 1917
JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

SCHNEIDER GRANITE COMPANY,
Plaintiff in Error

vs.

GAST REALTY & INVESTMENT COMPANY and EMILY GAST,
Defendants in Error

No. [redacted]461
October Term, 1916.

GAST REALTY & INVESTMENT COMPANY and EMILY GAST,
Plaintiffs in Error.

vs.

SCHNEIDER GRANITE COMPANY,
Defendant in Error.

No. 473.
October Term, 1917.

REPLY TO BRIEF OF GAST REALTY & INVESTMENT COMPANY AND EMILY GAST.

HICKMAN P. RODGERS,
WILLIAM K. KOERNER,
Attorneys for Schneider Granite Company.

Clive 2000 Wilcox Printing Co., Ninth and Walnut Central 4007

IN THE

SUPREME COURT OF THE UNITED STATES

SCHNEIDER GRANITE COMPANY, *Plaintiff in Error* vs. **GAST REALTY & INVESTMENT COMPANY and EMILY GAST,** *Defendants in Error*	**No. 1046. October Term, 1916.**
GAST REALTY & INVESTMENT COMPANY and EMILY GAST, *Plaintiffs in Error.* vs. **SCHNEIDER GRANITE COMPANY,** *Defendant in Error.*	**No. 473. October Term, 1917.**

REPLY TO BRIEF OF GAST REALTY & INVESTMENT COMPANY AND EMILY GAST.

POINTS AND AUTHORITIES.

The front foot rule of assessment has been sanctioned for the cost of paving a street.

French v. Barber Asphalt Paving Co., 181 U. S. 324.

Assessment by frontage is valid although the lots assessed are of unequal depth.

City of Harrisburg v. McCormick, 129 Pa. St. 213;
Diggins v. Hartshorne, 108 Calif. 154;
Tripp v. City of Yankton, 10 S. D. 516.

A tax legal in part and illegal in part will be upheld so far as legal.

Santa Clara County v. Southern Pacific R. R. Co., 118 U. S. 394;
Central Pacific R. R. v. California, 162 U. S. 91;
Cooley on Taxation (3rd Ed.) 1510.

ARGUMENT.

It is true, as intimated in defendants' brief, that after the original opinion in this case had been handed down by this Court, a great deal of uncertainty existed in the minds of counsel and of others in the City of St. Louis as to the meaning and effect of said opinion. This uncertainty was to some extent removed by the explanatory memorandum handed down on the petition for rehearing, by which it is made plain that the condemnations of the opinion apply not at all to the frontage tax, and to only so much of the area tax as is unjust.

In the light of this memorandum and of the statement in the original opinion that "the front foot rule has been sanctioned for the cost of paving a street," it is difficult to see how defendants can seriously contend that this Court has condemned the frontage assessment.

This method of assessment has been upheld in many cases and in some of them it must doubtless have been that the lots and tracts of land assessed varied as widely in depth as do those in the assessment district now before the Court. Wherever this question of variance of depth has been called to the Court's attention and urged as a ground for relief from taxation, it has been repudiated.

City of Harrisburg v. McCormick, 129 Pa. St. 213;
Diggins v. Hartshorne, 108 Calif. 154;
Tripp v. City of Yankton, 10 S. D. 516.

It would be absurd to say that this frontage assessment is void but would be good if defendants' land was of less depth.

The difference between the area assessment and the frontage assessment is that if the rear portion of defendants' property were exempted from the former, the amount of defendants' tax would be proportionately less, whereas, if it were exempted from the latter, the amount of their tax would remain the same. It would merely be condensed upon the front portion of their property.

To hold this frontage assessment bad it would have to be said that it was "palpably arbitrary and a plain abuse." This it clearly is not, and has often been held not to be.

The further argument of defendants that because the frontage and the area tax are assessed by the same ordinance, and the area tax is, at least in part, condemned, therefore the frontage tax must fail, is unsound. To say that because defendants are relieved from part of a tax, therefore they must be relieved from all of it, although the balance is easily separable and plainly equitable, would be to cast discredit upon the law.

It has frequently been held that the illegality of part of a tax will not invalidate the balance where it is separable.

Santa Clara County v. So. Pac. Ry Co., 118 U. S. 394, *l. c.* 415;

Central Pac. R. R. v. California, 162 U. S. 91, *l. c.* 163;

Cooley on Taxation (3rd Ed.), page 1510.

In the Santa Clara County case at page 415, the Court says:

> "It was then incumbent upon the plaintiff by satisfactory evidence, to separate that which was illegal from that which was legal * * * * and thus impose upon the defendant the duty of tendering in, or enabling the Court to enter judgment for, such amount, if any, as was justly due."

Defendants' proposition that where part of a statute or ordinance is void, the whole must be held invalid, unless it appears that the legislature would have enacted the valid portion without the invalid, has no application here. The reason for the rule does not apply. Furthermore, the facts are not with defendants. It is plain that the charter would have provided for at least this much frontage assessment had the area assessment never been thought of.

* * * * * *

Defendants' learned counsel say in their brief that what plaintiff's counsel really want is a rehearing of the original case. In this they are mistaken. All that we ask is that the Court tell us whether by its former opinion it has condemned the area assessment in its entirety or only so much thereof as is unjust. If the former, then we must needs be content with our small frontage tax; if the latter, then we shall ask the Missouri Supreme Court to remand the cause to the Circuit Court that we may, if necessary, by amended

pleadings and appropriate proof, separate the good from the bad and recover that which is good.

Respectfully submitted,

HICKMAN P. RODGERS,
WILLIAM K. KOERNER,

Attorneys for Schneider Granite Company.

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JAMES D. MAHE
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IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, A. D. 1917

GAST REALTY & INVESTMENT COMPANY and EMILY GAST,
Plaintiffs in Error.
vs.
SCHNEIDER GRANITE COMPANY,
Defendant in Error.
No. 473

SCHNEIDER GRANITE COMPANY,
Plaintiff in Error,
vs.
GAST REALTY & INVESTMENT COMPANY and EMILY GAST,
Defendants in Error.
No. [redacted] 46

Statement, Brief and Argument of Gast Realty & Investment Company and Emily Gast

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SCHNEIDER GRANITE COMPANY,
Plaintiff in Error,
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Defendants in Error.
No. 1,046

Statement, Brief and Argument of Gast Realty & Investment Company and Emily Gast

STATEMENT.

The present action is a suit upon a special tax bill for a street improvement in the City of St. Louis. Section 14 of Article 6 of the City Charter which was in

force at the time—the charter has since been repealed—established for every street improvement a taxing district, which was bounded, on either side of the improvement, by a line midway between the street improved and the next parallel or converging street, and the ordinance for the street improvement involved in the present action directed that the cost of the improvement should "be levied as a special tax upon all the property within a district defined and bounded by Section 14 of Article 6 of the Charter of the City of St. Louis" Printed Transcript of Record on original writ of error, page 43).

The Charter and consequently the ordinance which followed it, provided that the cost of the improvement should be assessed one-fourth according to the frontage and three-fourths according to the area of the district. This Court in its determination of the cause on the former writ of error held that the ordinance in question was productive of unequal taxation, that this inequality was not "an incidental result of a rule that as a whole and on the average may be expected to work well, but of an ordinance that is a farrago of irrational irregularities throughout." And this Court further held "that the ordinance following the order of the Charter is bad upon its face"; and it reversed the judgment for the enforcement of the tax bill. (240 U. S. 55.)

Both the part of the tax in question assessable according to frontage, and the part assessable according to area, were assessed against identically the same property, so that all the remarks of this Court with respect to inequalities in the varying depths of the property assessed are applicable to both parts of the tax.

This was the necessary result of the Charter, and it was the result of all ordinances enacted under the Charter whenever the property assessed extended, as it did in the case at bar, to the midway line which bounded the district. Thus the part of the assessment involved in this case, which was levied according to frontage, and the part which was levied according to area, were both imposed on the property of the plaintiffs in error to a depth of about five hundred feet; and both the frontage assessment and the area assessment which were involved in Gilsonite Roofing & Paving Co. v. St. Louis Fair Assn., 231 Mo. 589, cited by this Court in its opinion, were imposed upon property to a depth of 1,947 feet from the improvement.

Under these circumstances all the parties to the present cause assumed upon the former argument of this cause in this court that, if unconstitutional taxation resulted from the provisions of the Charter, or ordinance, the entire assessment, that by frontage as well as that by area, would fall.

In the brief then filed by us (page 17) we said: "We take it * * * that the only question, therefore, left for determination in this court is whether the Charter provision of the City of St. Louis, thus construed, is repugnant to the Constitution of the United States." And, replying to this remark, the learned counsel for the Schneider Granite Company, defendant in error, in the brief then filed by them (page 5) said: "That statement of the question, concise as it is, is a trifle broad, because on the record of the case the question has narrowed to this: Is the Charter provision of the City of St. Louis, as construed by the Supreme Court

of Missouri and applied in the present case, repugnant to the first section of the Fourteenth Amendment of the Federal Constitution? If this question is here decided in the affirmative, plaintiffs in error will have the benefits of the improvement to their property, and the contractor will be absolutely without redress."

This Court, in its opinion, took the same view, stating, at the very outset of its opinion: "The only question here is whether the ordinance levying the tax under the Charter of the city is consistent with the Fourteenth Amendment of the Constitution of the United States." (240 U. S. 55.)

When his Court rendered its opinion in this cause all the counsel in the case understood that it declared void the entire tax involved in the case.

Thereupon the Schneider Granite Company presented a petition for a rehearing, in which it declared (page 4): "This Court has held the entire assessment void." And it prayed the rehearing on the specific ground (page 2) that "the Court in its opinion and judgment overlooked the fact that under the Charter and ordinance one-fourth of the total assessment was levied against the property abutting the street improvement in proportion to its frontage, that is, under the 'front foot' rule." Motion for leave to file this petition for a rehearing was denied.

The opinion rendered by this Court created unnecessary alarm on the part of contractors in the City of St. Louis, and of officials of that city, who feared that the opinion would be construed as invalidating the entire Charter provisions and all tax bills which had been issued under that Charter. Thereupon the City Coun-

sellor of the City filed a motion for leave to enter an appearance as *amicus curiae,* and able counsel for contractors also filed suggestions for a modification of the decision. All these able counsel concurred in the view that the opinion rendered the entire tax in the case at bar, that by frontage as well as by area, invalid, but they sought to have language of the Court restricted so that it should not create an impression on the part of taxpayers that all assessments made under the Charter, no matter how fairly apportioned, had been held to be invalid. Said the counsel for the City, in concluding their argument, at page 33 of their brief: "We submit, therefore, that if a rehearing is denied the opinion should be so modified as to show that it is not intended to hold the provisions of the Charter invalid, but only to hold that the particular ordinance in question is invalid as to the plaintiff in error's property."

And said the other intervening counsel (Messrs. Frederick W. Lehmann and Benjamin Schnurmacher), in concluding their suggestions, and after reference to parts of the opinion of this Court: "This it is feared invalidates not only the ordinance, but as well the Charter provision, *in toto,* and so nullifies all tax certificates for paving done under authority of the Charter provision, even those which charge the property with what under the decision of the Court is less than its fair share of the expense. It is respectfully suggested that the decision and opinion should be so modified as to avoid such a result."

Thereupon this Court denied leave to the Schneider Granite Company to file its petition for a rehearing and subjoined the following memorandum to its opinion:

> "Our decision is limited, of course, to the particular ordinance before the Court; to the assessment of three-quarters determined in the mode described, and to those who, like the plaintiff in error, have suffered from the inequalities that have no justification in law." (241 U. S. 694.)

After the mandate of this Court was received in the Supreme Court of Missouri, the Gast Realty & Investment Company and Emily Gast filed a motion for a judgment pursuant to the mandate. Judgment was entered by the Supreme Court of Missouri, but that judgment invalidated only so much of the special tax bill in suit as had been levied according to area; it upheld the part of the tax bill which had been assessed according to frontage, and directed the trial court to enter judgment in accordance with these views. (269 Mo. 561.) Believing that this judgment was not in accord with the ruling of this court, these parties, who were original defendants in the cause, again sued out a writ of error. The question now presented accordingly is, whether the ruling of the Supreme Court of Missouri, in upholding the part of the tax bill which had been assessed acoording to frontage, was in conformity with, or whether it conflicts with, the opinion and mandate of this Court.

ERRORS RELIED UPON.

1. The Supreme Court of the State of Missouri erred in not following and obeying the mandate of the Supreme Court of the United States in this cause.

2. The Supreme Court of the State of Missouri erred in failing to comply with the said mandate and opinion of the Supreme Court of the United States, and in failing to reverse the prior judgment in said cause, and to direct judgment for the defendant, and erred in directing judgment against the defendant for a part of the tax bill sued on, to-wit, the amount of the assessment by frontage.

3. As this Court declared the ordinance underlying the entire tax void, and reversed the entire judgment, the state court had power only to execute the mandate, and enter or direct the entry of judgment for defendants.

POINTS.

I.

The opinion of this Court on the former writ of error holds invalid the entire tax in suit. (240 U. S. 55.)

(a) The declaration in the opinion of this Court, that the only question involved was that of the constitutional validity of the ordinance, was tantamount to a declaration that the decision of that question determined all questions involved, and, therefore, the validity or invalidity of the entire tax.

(b) The holding of this Court that the ordinance was bad was a holding that the entire tax was bad. No part of the tax could subsist without a valid ordinance.

Scottish Union & National Ins. Co. v. Bowland, 196 U. S. 611, l. c. 629.
Treat v. White, 181 U. S. 264, l. c. 267.
Northern Pacific R. R. Co. v. Rockne, County Treasurer, 115 U. S. 600, l. c. 610.

(c) The holding of this Court, that the property involved was assessed "much farther than the distance within which paving could be supposed to be a benefit," involved the conclusion that the assessment by frontage was invalid, since the property assessed for frontage was assessed to that depth.

(d) The reversal of the entire judgment of the lower court implies the conclusion that the entire assessment

that by frontage as well as that by area, was invalid; if the frontage assessment had been held valid, that part of the judgment would in all likelihood have been affirmed.

(e) The memorandum subsequently attached by the Court to its opinion did not change the effect of the opinion as originally rendered. That memorandum on its face indicates that this Court considered what was stated therein to be obvious from the opinion itself, and consequently in accord with the opinion, and it is unlikely that this Court would have varied the effect of the opinion without discussion, and all the more that it would not have announced by the memorandum a conclusion opposed to that indicated by the opinion. The denial of leave to file a petition for a rehearing strengthens this presumption. (241 U. S. 694.)

(f) The memorandum was intended merely as a compliance with the request of intervening **amici curiae**, that the Court should indicate that it did not intend to invalidate asesssments, when the districts were regular and the apportionment of the taxes approximately fair. Those requests conceded, as did also the petition for a rehearing, that the opinion of this Court rendered invalid the entire tax involved.

(g) In determining the effect of the opinion and memorandum, it should be borne in mind that it was obligatory on this Court to pass upon the validity of the assessment by frontage as well as of that by area. The question was a federal question; but, even if it was

primarily a question for the state court, still, since the state court had never passed upon it, it became the duty of this Court to determine it.

Guinn v. United States, 238 U. S. 347, l. c. 366.
Myers v. Anderson, 238 U. S. 368, l. c. 380, 381.
Allen v. City of Louisiana, 103 U. S. (13 Otto) 80, l. c.
Poindexter v. Greenhow, 114 U. S. 269, l. c. 270.
Spraigue v. Thompson, 118 U. S. 90, l. c. 95.
Leloup v. Mobile, 127 U. S. 640, l. c. 647.
Connolly v. Union Sewer Pipe Co., 184 U. S. 540, l. c. 565;
International Text Book Cases v. Pigg, 217 U. S. 91, l. c. 114.
Williams v. Talladega, 226 U. S. 404.

II.

The opinion of this Court is conclusive, not only as to everything determined by it, but also as to everything involved in it.

Guarantee Co., Etc., v. Insurance Co., 124 Fed. Rep., 170 l. c. 171.
Davis v. McCorkle, 14 Bush. 746, l. c. 754, 755.
Crockett v. Gray, 31 Kan. 346, l. c. 351.
Dennes v. Kass & Co., 13 Wash. 137.
Warren v. Raymond, 17 S. C. 163.
Joslin v. Cowee, 56 N. Y., l. c. 627.
Park Land Corporation v. Mayor, Etc., of Baltimore, 128 Md. 611, l. c. 620.
Cahill v. Mayor, Etc., of Baltimore, 129 Md. 17, l. c. 19, 20.

This follows also from the rulings of this Court in:

Skillern v. May, 6 Cranch. 267.
Ex parte Story, 12 Peters 343.
Washington Bridge Co. v. Stewart, 3 How. 413.
Whyte v. Gibbes, 20 How. 542.

And the present writ of error presents only the question, whether the judgment of the State Supreme Court conforms to the ruling of this Court upon the matters thus determined or involved.

Bank of the United States v. Moss, 47 U. S. 31, 40.
Sibbald v. United States, 37 U. S. 488, 492.
Maguire v. Tyler, 84 U. S. 253; l. c. 283.
Roberts v. Cooper, 61 U. S. 467.
The Santa Maria, 10 Wheat. 431.

III.

The Supreme Court of Missouri undertook merely to follow what it deemed to be the ruling of this Court. It did not undertake to make any independent ruling, and, in saying that the amount due upon the assessment by frontage was readily separable from the remainder of the tax, it meant merely to indicate that no further determination of the amount due for the assessment by frontage, and no further hearing with regard thereto, was necessary.

But this was not equivalent to a holding, nor was it intended as a holding, that the assessment by frontage should survive the assessment by area. Upon that sub-

ject the Supreme Court of Missouri treated the ruling of this Court as conclusive.

Moreover, the fact, that the amount of the assessment by frontage was separable from that of the assesment by ara, is not determinative of the question, whether the provision of the law for assessment by frontage should stand, when that for the assessment by area was invalid.

Poindexter v. Greenhow, 114 U. S. 270, l. c. 305.
Howard v. Illinois Central R. R., 207 U. S. 463, l. c. 501.

ARGUMENT.

I.

The opinion of this Court on the former writ of error holds invalid the entire tax in suit.

Our foregoing statement shows that all the counsel in the case, as well as all the intervening counsel, held the opinion of this Court on the former writ of error to be an adjudication of the invalidity of the entire tax in suit, that by frontage as well as that by area. A general impression of that sort on the part of those familiar with the subject-matter is an excellent indication of the purport of a ruling

The consideration of the opinion of this Court, as originally rendered, seems to us to sustain irresistably the impression created by it.

If the question had been whether the area tax presented an arbitrary method of assessment, and, moreover, whether the frontage tax was valid or invalid, this Court would not have stated at the outset of its opinion, as it did. that the **only** question was whether the ordinance is consistent with the Fourteenth Amendment of the Constitution of the United States. If the Court had not intended to dispose of the entire tax, it would not have held "that the ordinance following the orders of the Charter is bad upon its face." In the one case the consistency of the ordinance with the federal constitution would not have been the only question involved; in the other, the entire ordinance would not have been held bad upon its face, but only one provision of it.

The holding that the ordinance is invalid, without limitation, was necessarily a holding that the entire tax was invalid. No tax can stand, nor can any part of a tax stand, without valid statutory provision. That is elementary law. "It may be conceded that no tax can be levied without express authority of law." (**Scottish Union & National Ins. Co. v. Bowland,** 196 U. S. 611, l. c. 629). "A tax cannot be imposed without clear and express words for that purpose." (**Treat v. White,** 181 U. S. 264, l. c. 267.) "No taxes can be assessed on any property but by virtue of the sovereign authority in whose jurisdiction it is done." (**Northern Pacific R. R. Co. v. Rockne County Treasurer,** 115 U. S. 600, l. c. 610),—and this, of course, means sovereign authority legally exercised.

The opinion of this Court does not contain a single word indicative of a purpose to uphold the validity of the part of the assessment, which is based upon frontage. This, in itself, demonstrates its purpose to apply its ruling to the entire tax. It is not conceivable that this would have been done, if this Court had entertained the slightest doubt of the invalidity of that part of the assessment. When this Court declared without limitation that the ordinance was bad upon its face, because repugnant to the federal constitution, it must have known that the natural conclusion would be that the entire ordinance, and, therefore, the entire tax was invalid. Had this Court had any thought of limiting this legitimate deduction, it would have given expression thereto in clear terms.

Moreover, this Court, in effect, declared that the depth to which the assessment was laid in this cause

extended beyond the distance to which the benefit from the improvement could be supposed to extend; for it said: "The City of St. Louis is shown by this case and by others in the Missouri reports to contain tracts not yet cut into city lots, extending back from streets without encountering a parallel street much farther than the distance within which paving could be supposed to be a benefit." The assessment by frontage, as well as the assessment by area, extended to that depth, for both were imposed upon identically the same property. Surely, this Court could not have intended to uphold an assessment for a local improvement, which was levied upon more property than was benefitted, and when this Court reversed the prior judgment in this cause on the first writ of error, it reversed the entire judgment. That, in itself, was an adjudication that the entire tax bill was invalid. If this Court had not intended that result, it would have reversed the judgment as to the part which represented the assessment by area, and affirmed the part which represented the assessment by frontage.

MEMORANDUM FILED IN OVERRULING PETITION FOR LEAVE TO FILE MOTION FOR REHEARING.

We now come to the consideration of the effect of the memorandum which this Court attached to its opinion. (241 U. S. 694.) That memorandum must be considered in connection with the circumstances which caused it.

Fearing that the decision in effect nullified altogether the charter provision relating to tax bills for street im-

provements and made void all outstanding tax bills for street improvements, whether the districts were regular or irregular, the City Counselor for the City of St. Louis filed a brief as *amicus curiae,* in which he asked this Court to modify the opinion so as to limit its effect to the particular ordinance in question and to irregular districts, and to exclude from the force and effect of the opinion the tax bills issued for improvements, where the districts on both sides of the street of the improvement were regular.

In addition to this, Mr. F. W. Lehmann and Mr. Benjamin Schnurmacher, on behalf of contractors, banks, trust companies and individuals interested in outstanding tax bills, filed a brief as *amici curiae* for a modification of the opinion, in which they stated that tax bills issued under the Charter provision in question were outstanding to the amount of two million dollars, and that they feared the decision "invalidates not only the ordinance, but as well the Charter provision *in toto* and so nullifies all tax certificates for paving done under the authority of the Charter provision. Their plea was based upon the ground that "the facts in the present case are quite exceptional," that few cases would be found in which the assessment districts embraced large tracts of land not yet subdivided, and that the combined front-foot rule and the area rule presented by the City Charter result generally in reasonable equality of taxation; and they asked for some indication on the part of this Court that the opinion of the Court was not intended to extend to cases in which the taxation was approximately fair.

In all the briefs or suggestions in this Court it was conceded that, in the case at bar, the opinion of that Court vitiated the tax bills in suit in their entirety.

When this Court came to pass on the motion for leave to file a petition for rehearing, it indicated, in conformity with these requests, that the opinion was limited, of course, to the particular ordinance before the Court, and the questions involved in it; that is, to cases of the assessment of the three-quarters or area tax in the mode described in the opinion. In other words, the Court did just what it had been asked to do. The Court desired to make it clear that it did not intend to pass upon any other case than the one before it, or to decide any questions not involved; but it did not undo or withdraw any part of its decision, when limited to the case at bar and similar cases.

The Court did not withdraw or alter anything which it had said in its opinion. The use of the words "of course" in the memorandum clearly shows this. That expression indicates that the Court considered that what it stated in its memorandum was in accord from its opinion, indeed, was obvious from the opinion itself. It is not likely that this Court would have left unchanged the expressions in its opinion to which we have referred, nor that it would have denied to the defendant in error leave to file a motion for a rehearing, if it had altered the views expressed in its opinion, and even reached a conclusion diametrically opposed to that opinion; and this would be all the more unlikely since there was no discussion or consideration whatsoever in the memorandum of the matters previously determined.

Moreover, in the determination of the effect of the opinion of this Court, including the memorandum appended thereto, it would be proper, if it were necessary, to consider that it was obligatory on this Court to pass upon the validity of the assessment by frontage as well as of that by area. **The question was a federal question, because the claim for constitutional invalidity attached to the entire tax.** Indeed, as we have shown in our foregoing statement, the reasons assigned by this Court for its ruling were applicable to both parts of the assessment. But, even if the validity of the frontage tax had been primarily a question for the state court, still the fact that the state court had never passed upon it, or even considered it, would have rendered it the duty of this Court to determine it. (Guinn v. United States, 238 U. S. 347, l. c. 366; Myers v. Anderson, 238 U. S. 368, l. c. 380, 381.) And this Court has discharged that duty in probably every case before it, which involved it, and has in quite a number of instances held state legislation invalid when only a part of that legislation violated the federal constitution.

Guinn v. United States, *supra*.
Myers v. Anderson, *supra*.
Allen v. Louisiana, 103 U. S. (13 Otto) 80, l. c.
Poindexter v. Greenhow, 114 U. S. 269, l. c. 270.
Spraigue v. Thompson, 118 U. S. 90, l. c. 95.
Leloup v. Mobile, 127 U. S. 640, l. c. 647.
Connolly v. Union Sewer Pipe Co., 184 U. S. 540, l. c. 565.
International Text Book Cases v. Pigg, 217 U. S. 91, l. c. 114.
Williams v. Talladega, 226 U. S. 404.

II.

The opinion heretofore rendered in this cause by this Court is conclusive, not only as to everything determined by it, but also as to everything involved in it. The present writ of error presents only the question, whether the judgment of the State Supreme Court conforms to the ruling of this Court upon the matters thus determined or involved.

That the opinion of this Court is conclusive as to everything expressly determined by it, and that the prior ruling of this Court will not be reconsidered or reviewed in the present proceedings, has been so often determined by this Court, and is so thoroughly settled by the decisions of this Court, that we content ourselves with a mere citation of some of those decisions.

Bank of United States v. Moss, 47 U. S. 31, 40.
Sibbald v. United States, 37 U. S. 488, 492.
Maguire v. Tyler, 84 U. S. 253, 283.
Roberts v. Cooper, 61 U. S. 467.
The Santa Maria, 10 Wheat. 431.

But the opinion is thus conclusive not only as to matters expressly decided, but also as to everything involved in the matter decided. A party to an appeal or writ of error cannot reserve a question for future consideration by failing to make it when it is his duty to do so. The general rule as to the conclusiveness of judgments applies. Said the Circuit Court of Appeals for the Eighth Circuit in **Guarantee Co., Etc., v. Insurance Co.**, 124 Fed. Rep. 170, l. c. 171:

"This condition of the record suggests the query whether the questions raised by the record of the Court during the trial were not rendered *res adjudicata* by the former judgment of this court upon the writ of error set out by the plaintiff. That judgment, like the final decision of every court which has jurisdiction of the matters and parties it judges, rendered every question which was litigated and every question which might have been raised and determined in this court at the time of the hearing of a former writ of error *res adjudicata* between the parties to it."

This also follows from the rulings of this Court in

Skillern v. May, 6 Cranch. 267.
Ex parte Story, 12 Peters 343.
Washington Bridge Co. v. Stewart, 3 How. 413.
Whyte v. Gibbes, 20 How. 542.

These cases hold that, when the pleadings in a federal case fail to allege jurisdictional facts, but this defect is not drawn to the attention of this Court on writ of error or appeal, nor considered by it, and this Court consequently determines the writ of error or appeal on its merits, it will be too late to subsequently question the jurisdiction on account of this defect.

Our position in this regard is also sustained by authority in other jurisdictions.

"Reason and authority alike demand that if on a first appeal there is a question in the record which, if decided in favor of the appellee, would entitle him to an affirmance of the judgment in his favor, it is his duty to present it to the Court, when

it will become the duty of the Court to decide it, and if the appellee fails to present the question, or the Court fails to decide it, and reverses the judgment, on a subsequent appeal that question must be treated as having been decided adversely to the appellee in the first case, whether he be appellant or appellee on the subsequent appeal." (Davis v. McCorkle, 14 Bush. 746, l .c. 754, 755.)

"It was a question necessarily involved in the case as it came to us before counsel failed to present it then and it is too late now. A case cannot be tried by piecemeal. Every defense that exists must be presented, and when a case is reversed the defeated party will not be heard to say that there were other reasons for affirmance which he might have presented. A decision once made becomes the law of the case, and this rule embraces not merely all questions presented, but also all questions necessarily involved in the decision." (Crockett v. Gray, 31 Kan. 346, l. c. 351. Opinion by Brewer, J.)

"Questions determined upon an appeal, or which might have been, if presented, will not be considered by the appellate court upon a second appeal of the same action." (*Syllabus* of Dennes v. Kass & Co., 13 Wash. 137.)

"All points decided by this court on appeal, or necessarily involved in what was decided, are *res adjudicata*, and cannot be again considered in the cause." (*Syllabus* of Warren v. Raymond, 17 S. C. 163.)

"When an appeal is taken all the questions which may be properly raised in this Court on the then state of the record as it may exist in the court of original jurisdiction must be considered as em-

braced in the first appeal, and if not then raised and presented for decision, they must be considered as waived, otherwise, there would be no end of litigation and appeals. * * * *This Court is presumed in every case to have considered all questions properly presented by the record and raised on the appeal, which are found necessary for the determination of the rights of the parties to the suit.*"

Park Land Corporation v. Mayor and City Council of Baltimore, 128 Md. 611, l. c. 620 (the italics used in this quotation appear in the opinion.)

To like effect is Cahill v. Mayor and City Council of Baltimore, 129 Md. 17, l. c. 19, 20.

III.

REPLY TO BRIEF FOR SCHNEIDER GRANITE COMPANY.

The brief filed by the learned counsel for the Schneider Granite Company concedes that the only question now before this Court is that of the effect of the opinion of this Court upon the former writ of error. But, while that brief ostensibly proceeds upon that theory, it really seeks a rehearing.

That brief, first, seeks to have this Court direct the levy of a new area tax—not an area tax in accordance with the ordinance and Charter of the City of St. Louis, but one for which there is no provision of law, and whose amount, as well as the property to be affected

by it, is to be determined by the lower court as a matter of fact without any legal provision therefor.

Surely it cannot be said that the opinion rendered by this Court contains anything which warrants any such position.

As to the merits of the claim, if that were before this Court, it would suffice to say that no reassessment can be sustained without a provision of law therefor, and that what the Schneider Granite Company is really seeking is not a judicial determination of this cause, but new legislation and new taxation under it, all in one.

The brief for the Schneider Granite Company refers, secondly, to the question whether the assessment by frontage should be sustained. We have already addressed ourselves to that subject, and desire further to reply only to a remark made by counsel for the Schneider Granite Company in the conclusion of their brief, to the effect that the Supreme Court of Missouri holds that the assessment by frontage is separable, and that its ruling on this point does not present a federal question. It really does not matter what the Supreme Court of Missouri held upon that subject, if, as we have undertaken to show, it was determined by, or was involved in, the decision of this Court. But counsel for the Schneider Granite Company are mistaken, in our judgment, both as to their claim that this is a local as distinguished from a federal question, and as to their view (if we understand them correctly) that the Supreme Court of Missouri has held, as a matter within its own independent jurisdiction, that the assessment by frontage survived the assessment by area.

The Supreme Court of Missouri merely undertook to follow what it conceived to be the ruling of this Court. It sustained the frontage assessment, because it reached the conclusion that that part of the assessment had been sustained by the former opinion of this Court, saying:

> "A reasonable construction of the ruling of the Supreme Court of the United States is that it is limited to a holding of the invalidity of the ordinance in question only so far as the latter concerns an assessment of property for street improvement based on the area rule."

Having reached the conclusion that this Court meant to sustain the part of the assessment which was made by frontage, the Court proceeded further and held that the amount of that assessment was severable on the face of the tax bill from the amount of the assessment by area, and that a retrial to determine the amount of the assessment by frontage was, therefore, unnecessary. In that connection it said:

> "As the amounts due under each of the methods of taxation are separately stated in the tax bills, no difficulty can be encountered in determining the amounts due in each upon the frontage basis."

But the amounts of two parts of a tax may be separate and distinct, and yet the provisions of the law creating both parts of the tax may be so interwoven and so dependent upon each other that the invalidity of the one provision affects the entire law. A law may provide for two things, but have a single scheme or purpose, and there may be two parts of a tax which are

integral in themselves, but which, nevertheless, are parts of a composite whole.

Said this Court in **Poindexter v. Greenhow,** 114 U. S. 270, l. c. 305:

> "Indeed it is quite manifest, from the face of the laws themselves, that they are together but parts of a larger whole."

And said this Court in **Howard v. Illinois Central R. R.,** 207 U. S. 463, l. c. 501:

> "Moreover, even in a case where legal propositions may be severed from those which are illegal, in order to save, the rule applies only where it is plain that Congress would have enacted the legislation with the unconstitutional provisions eliminated."

The Supreme Court of Missouri in its opinion refers to its prior ruling in **Collier Estate v. West Paving Co.,** 180 Mo., l. c. 375. To avoid misapprehension with regard to the effect of the case thus cited, we will add that the citation is made merely to show that the amount of the asesssment by frontage can be separated from the amount of the assessment by area, and that the case cited does not hold that the assessment by frontage can stand when the assessment by area is invalid, or even involve any such question.

In the **Collier case,** no attempt was made to invalidate the assessment by frontage, nor was any attempt made to have the law providing for the tax declared invalid. The sole claim was that the assessment dis-

trict had not been established in accordance with the provisions of the Charter, and that the area assessment was, therefore, not enforceable; wherefore, it was prayed that the collection of the area assessment should be enjoined. Said the Supreme Court of Missouri in that case, with reference to the position of the complainants therein (180 Mo., l. c. 391):

> "All that they demand is that this district shall be laid out and defined as the Charter provides."

IV.

We respectfully ask that the judgment in this cause be reversed and the cause remanded with directions to the Supreme Court of Missouri to cause judgment to be entered for the defendants in the Circuit Court of the City of St. Louis, being the trial court. It is preferable that the final judgmen in the cause be entered there, because the suit affects real estate situated in the City of St. Louis, and any judgment affecting the title to the realty should be of record locally.

Respectfully submitted,

ROBERT A. HOLLAND, JR.,
THOMAS G. RUTLEDGE,
J. M. LASHLY,
DAVID GOLDSMITH,
Attorneys for Gast Realty & Investment Company and Emily Gast.

Supreme Court, U. S.
FILED
APR 19 1917
JAMES D. MAHER
CLERK

IN ERROR

Supreme Court of the United States

OCTOBER TERM, 1916.

[redacted]

vs.

[redacted]

No. [redacted] 46

[redacted]

[redacted]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916

SCHNEIDER GRANITE COMPANY,
Plaintiff in Error

vs.

GAST REALTY & INVESTMENT COMPANY and EMILY GAST,
Defendants in Error

} No. 1046.

MOTION TO ADVANCE CAUSE FOR HEARING.

Now comes the plaintiff in error, Schneider Granite Company, by its attorney of record, and moves this Honorable Court to advance this cause for hearing; and for grounds hereof plaintiff in error says:

1st: That this case has been once adjudicated by this Court upon its merits, having been formerly numbered 578, October Term, 1914;

2nd: That this cause is now before this Court on a writ of error to the Supreme Court of Missouri and involves the interpretation of the latter court of the opinions and rulings formerly had and entered by this Court.

HICKMAN P. RODGERS,
Of St. Louis, Missouri, Attorney of Record
for Plaintiff in Error.

NOTICE OF MOTION.

The defendants in error are hereby notified that the plaintiff in error will on the 20th day of April, 1917, on the convening of the Supreme Court of the United States on that day, or as soon thereafter as a hearing may be had, submit for the consideration of said Court the foregoing motion.

HICKMAN P. RODGERS,
Of St. Louis, Missouri, Attorney of Record
for Plaintiff in Error.

SUGGESTIONS.

This case now falls clearly within the provisions of Section 4 of Rule 26 of this Court, and it would appear unnecessary for plaintiff in error to do more than call attention to the rule and its application.

HICKMAN P. RODGERS,
Of St. Louis, Missouri, Attorney of Record
for Plaintiff in Error.

Copy of foregoing motion and suggestions in support thereof and notice received this 12th day of April, 1917.

THOMAS G. RUTLEDGE,
HOLLAND, RUTLEDGE & LASHLY,
DAVID GOLDSMITH,

Of St. Louis, Missouri, Attorneys of Record for Defendants in Error.